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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re G.S. et al., Minors.

JOSHUA M. et al.,

Petitioners and Appellants,

v.

RAYMOND N.,

Objector and Respondent;

G.S. et al.,

Appellants.

D053663

(Super. Ct. No. AN12761)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed.

Joshua M. and Judith M. appeal the denial of their petition to declare Judith's children, G.S. and C.S., free from the custody and control of the children's father, Raymond N. (Fam. Code, § 7822.)<sup>1</sup> The children also appeal. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Judith M. and Raymond N. are the divorced parents of two children, G.S., born February 2003, and C. S., born June 2006. Judith met Raymond in 2001. At the time, Raymond was a Marine stationed at Twentynine Palms. Judith had an eleven-month-old baby girl, J.S., from a previous relationship.

Two weeks after they met, Judith and Raymond began living together. They married in February 2002. Their relationship was volatile. In June 2002 the Marine Corps substantiated a domestic violence incident against Judith as the primary aggressor and Raymond as the secondary aggressor.

During the marriage, Raymond served in Iraq for seven months, where he was injured when his transport hit an improvised explosive device. As a result of his combat experience in Iraq, Raymond was diagnosed with posttraumatic stress disorder (PTSD), moderate severity, and alcohol abuse.

The military transferred the family to South Carolina in December 2004.

Raymond was arrested for domestic violence in approximately April 2005. He began treatment for PTSD on June 17 and was scheduled to enter an inpatient alcohol treatment program. Between June 21 and 23, Judith and Raymond had several arguments

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<sup>1</sup> All statutory references are to the Family Code.

that escalated into domestic violence. Raymond choked Judith, slammed a door on her legs and threw her onto a bed. She sustained deep bruises on her back, arms and legs.

Raymond was sent to the Brig, where he received alcohol abuse treatment and other services. During this time, Judith had an extramarital affair. In late August 2005 Raymond received a general discharge from the Marine Corps, under honorable conditions, and returned to the family home.

In October 2005 Judith left Raymond and returned to California with the children. Less than two weeks after she moved, Judith learned she was pregnant. Raymond denied paternity. Judith filed for custody of the children in California. In December the family court exercised emergency jurisdiction, awarded Judith sole physical and legal custody of G.S., reserved jurisdiction over child support and ordered no visitation by Raymond pending further order of the court.

Raymond spoke to J.S. and G.S. (the girls) until May 2006, at which time Judith "ended all communication" with him. Raymond did not communicate with G.S. after May. He did not send child support. C.S. was born in June 2006. Judith was not certain Raymond was informed of her birth.

Judith's and Raymond's divorce was final in July 2006. In August Judith married Joshua M., a Marine stationed at Twentynine Palms that she had been dating since January.

On March 6, 2008, as a companion to a stepparent adoption, Joshua M. and Judith filed a petition to declare G.S. and C.S. (the children) free from Raymond's custody and control. Paternity testing confirmed that Raymond was C.S.'s father.

Trial proceedings were held on August 26, 28 and 29, 2008. The adoptions social worker and minors' counsel recommended the court grant the petition to free the children for adoption.

Judith testified that despite their marital problems, Raymond had been a loving father and a good provider. In October 2005 she saw him playing with a gun in his vehicle after an argument. Judith was afraid of Raymond and left to protect the girls from domestic violence. After she returned to California, Raymond maintained contact with the girls. If Raymond wanted to speak with them, he would telephone a family member and Judith would telephone Raymond from a blocked cellular telephone. Judith communicated with Raymond until May 2006.

Raymond testified that after Judith left, he would telephone one of her relatives, and the relative would let Judith know that he wanted to speak to her or the girls. It generally took about a week for Judith to respond. He was stranded in South Carolina because of his financial situation. Six to nine months after Judith left, his house was foreclosed. Raymond saved enough money for a bus ticket to California, and began to search for Judith and the girls. He could not find them. Judith was hiding from him the entire time. Raymond never obtained her telephone number.

Raymond kept in touch with Judith's mother, father, aunts and uncles. He received all his information about the girls through them. He did not send letters, cards or gifts to the girls because he did not have their address. Raymond could have left a letter with one of Judith's relatives but he did not believe the girls would have received it. He offered to send gifts and money to Judith's mother's home, but Judith refused. Judith's mother did

not want to act as a go-between because she was afraid that Judith would not allow her to see her grandchildren. Although he questioned his paternity of C.S. "the entire time," Raymond was excited and overwhelmed to learn he was her father.

On rebuttal, Judith testified Raymond never offered to pay child support. When she arrived in California in October 2005, she asked for child support, and he refused, saying she was the one who left him. Judith did not ask the family court to order child support. Judith specifically asked family members not to disclose her phone number and address to Raymond. Judith was bothered by the close relationship between her mother and Raymond but would have accepted his gifts and letters for the girls. Her mother did not agree with the proposed adoption, but Judith did not restrict her contact with the girls.

The court asked Raymond why he moved to Northern California instead of establishing a home closer to the children. Raymond testified he could not find work as a union carpenter in San Diego; further, he did not know the children's whereabouts. He made multiple trips to Palm Springs to try to find them and kept in good contact with Judith's family. That was the best he could do. He recently had surgery and received disability payments of \$198 every two weeks.

The court found that the evidence did not show Raymond left his children with the intent to abandon them. Although Raymond did not communicate with his daughters or support them for one year or more, it was clear to the court that it was difficult for Raymond to contact his daughters, either directly or indirectly, and there were extenuating circumstances with respect to his financial obligations to them. The court stated that if its role was to determine the children's best interests without a finding of

abandonment, then its ruling would have been different in view of Raymond's instability. The court "very reluctantly" denied the petition.

## DISCUSSION

### I

#### *Substantial Evidence Supports the Court's Finding Raymond Did Not Abandon His Children Within the Meaning of Section 7822*

### A

Petitioners and minors contend the court's finding that Raymond did not abandon his children is not supported by substantial evidence. They argue that by continuing to act in a violent and abusive manner toward Judith, Raymond voluntarily "left" the children in her care and custody. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1011-1012 (*Allison C.*) [by engaging in domestic violence and other crimes and abdicating his parental role by nonaction, father abandoned his child within the meaning of section 7822].) They contend the evidence is undisputed that Raymond did not contact or support his children after May 2006; therefore, abandonment is presumed.

Petitioners and minors argue no substantial evidence supports the court's findings that Raymond did not have the ability or opportunity to contact his children and that his failure to pay child support was mitigated by his financial difficulties and the lack of a child support order. Petitioners also contend the court's reliance on Raymond's service in Iraq and subsequent diagnosis of PTSD as mitigating factors does not rebut the presumption Raymond intended to abandon his children. (*In re Rose G.* (1976)

57 Cal.App.3d 406, 424 [in the absence of any showing of concern for their children, mother's mental illness and father's incarceration did not rebut intent to abandon].)

## B

Section 7800 et seq. governs proceedings to have a child declared free from a parent's custody and control. The purpose of such proceedings is to promote the child's best interest "by providing the stability and security of an adoptive home . . . ." (§ 7800.) The statute is to "be liberally construed to serve and protect the interests and welfare of the child." (§ 7801.)

Under section 7822, a court may declare a child free from a parent's custody and control if the parent has abandoned the child. Abandonment occurs when a "parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, *or* without communication from the parent, with the intent on the part of the parent to abandon the child." (§ 7822, subd. (a)(3), italics added.)" (*Allison C.*, *supra*, 164 Cal.App.4th at pp. 1009-1010; *In re Amy A.* (2005) 132 Cal.App.4th 63, 68 (*Amy A.*); *In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 754.) To prevail under section 7822, the petitioner must establish these elements by clear and convincing evidence. (§ 7821.)

The parent need not intend to abandon the child permanently; it is sufficient the parent had the intent to abandon during the statutory period. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 885.) Lack of communication or intent to abandon the child does not become material unless the parent has 'left' the child in the care and custody of the

other parent. (*Amy A.*, *supra*, 132 Cal.App.4th at p. 68, citing *In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 754.)

We apply a substantial evidence standard of review to the trial court's findings, keeping in mind that in a section 7822 proceeding, "all of the trial court's findings must be made by clear and convincing evidence." (*Amy A.*, *supra*, 132 Cal.App.4th at p. 67.) Our function is limited on review to determine whether substantial evidence supports the conclusions reached by the trial court. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1211.) We have no power to pass on the credibility of witnesses, resolve conflicts in the evidence or determine the weight of the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

## C

Substantial evidence supports the court's finding that Raymond did not leave his children within the meaning of section 7822. The court observed that although Judith left because of domestic violence, there were constraints on Raymond's ability to communicate with the children and to locate them. Raymond appeared to be a much more stable individual before he served his country in Iraq, and Judith testified he had been a loving father and good provider. The court stated, "The picture drawn here is a Marine whose life spiraled out of control after he returned from Iraq, exacerbated in part by the relationship that his then wife had with another Marine."

Uncontradicted evidence shows that despite difficulties, Raymond maintained contact with G.S. until May 2006. At that time Judith "ended all communication" with him. She instructed her family members not to disclose her address and telephone



number to Raymond. Judith did not ask for child support after October 2005. The record supports the reasonable inference Raymond had sound reasons to believe Judith was not pregnant with his child. Judith did not inform Raymond of C.S.'s birth, initiate paternity proceedings or seek child support.

As soon as financially possible, Raymond bought a bus ticket and traveled across the country to search for the girls. He remained close to the children's grandmother, maintained contact with Judith's other family members and asked them for information about the girls' welfare. Raymond made multiple trips to Palm Springs to try to find them. He believed he would be reunited with the girls. Raymond did not obtain Judith's address until he was served with the petition. After they filed the petition, Judith and J. M. moved into base housing to impede Raymond's access to the family.

"Case law consistently focuses on the voluntary nature of a parent's abandonment of the parental role rather than on *physical* desertion by the parent." (*Amy A.*, *supra*, 132 Cal.App.4th at p. 69.) The court fully explained the reasons for its finding, which are supported by substantial evidence. Unlike the parents in *Amy A.* and *Allison C.*, *supra*, 164 Cal.App.4th 1004, who knew where their children were and did nothing, Raymond did not know where his children were and did his best to find them.

Further, the court did not err when it determined in view of Raymond's circumstances, his failure to pay child support did not evince intent to abandon the children. (*In re Baby Boy M.* (1990) 221 Cal.App.3d 475, 482 [failure to support the child when the parent does not have the ability to do so or when no demand has been made does not, by itself, prove intent to abandon].) The record supports the reasonable

inference that Raymond's lack of contact with his children was not voluntary. The court reasonably concluded the petitioners did not meet their burden to show, by clear and convincing evidence, that Raymond "left" the children with the intent to abandon them. (§ 7822.)

## II

### *Under Section 7822, the Petitioner Must Prove the Elements of Abandonment Before the Court Considers Whether Termination of Parental Rights Is in the Child's Best Interest*

The minors contend the court applied an incorrect legal standard when it stated that if it did not find that Raymond abandoned his daughters, then the issue of the children's best interest was "of no consequence for the court." They argue the court did not liberally construe section 7822 to serve and protect "the welfare and best interest of the child," as required by general provisions sections 7800 and 7801. Citing *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, minors assert that had the court understood that "the best interests of the child are paramount in interpreting and implementing [section 7822]" (*id.* at p. 162.), the court would have granted the petition. They contend the court improperly evaluated the evidence solely from the standpoint of Raymond's interests.

Raymond contends a finding of abandonment under section 7822 must precede a consideration of the child's best interests. He asserts proceedings to terminate parental rights are not governed by a "best interests" standard; rather, as a matter of constitutional law, the petitioner must first establish, by clear and convincing evidence, parental unfitness or abandonment. (*Stanley v. Illinois* (1972) 405 U.S. 645, 651; *In re B.G.* (1974) 11 Cal.3d 679, 688 [a parent's interest in the companionship, care, custody and

management of his or her children is compelling, ranked among the most basic civil rights].) Raymond argues the court applied the correct legal standard.

The minors do not address this court's earlier holding in *In re Baby Boy S.* (1987) 194 Cal.App.3d 925 (*Baby Boy S.*).) In that case, we previously considered whether the trial court erred when it did not evaluate the child's best interests before determining whether the parent abandoned his child. (*Id.* at p. 928 [decided under Civ. Code, former § 232, subd. (a)(1)].) In *Baby Boy S.*, as here, the trial court found that the petitioner did not establish abandonment. (*Ibid.*)

On review, in rejecting petitioner's argument the Civil Code sections 232.5 and 232.6 mandated consideration of the child's best interests before the trial court made an abandonment finding, we held, "Absent intent on the part of the parents to abandon the child . . . the best interests and welfare criteria are simply not applicable. If otherwise, the objective manifestations of abandonment, as here, would compel an abandonment conclusion and free the child from parental custody and control, as parental intent would be weighed against the interests and welfare of the child." (*Baby Boy S.*, *supra*, 194 Cal.App.3d at p. 933.) We concluded because substantial evidence supported the trial court's finding the parents did not intend to abandon their child, considerations of the child's interest and welfare "[did] not come into play and [the] evidence adduced before the court [was] not relevant to the petition." (*Id.* at p. 934; *In re Daniel M.* (1993) 16 Cal.App.4th 878, 886 ["a court should not use the device of liberal construction to find an intent to abandon where no such intent exists, simply because it appears the child's welfare and interests would best be served by adoption"].)

At oral argument, minors' counsel asserted *Baby Boy S.*, *supra*, 194 Cal.App.3d 925 no longer applies because the statute had been amended. Although the statutes at issue in that case, Civil Code former sections 232, subdivision (a)(1), 232.5 and 232.6, have been repealed, they are now codified at Family Code sections 7800, 7801 and 7822, without substantive change.<sup>2</sup> (Stats. 1992, ch. 162, § 2, (operative Jan. 1, 1994).) To the extent the issues of statutory construction raised here have not been resolved by the California Supreme Court in *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*), we believe that *Baby Boy S.* remains sound precedent in the resolution of this appeal.

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<sup>2</sup> The relevant portion of the prior statute stated: "An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his parents when the child comes within any of the following descriptions: (1) *The child has been left . . . by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent . . . with the intent to abandon the child.*" (Civ. Code, former § 232 , subd. (a) & (a)(1), Deering's (1987) at p. 84, italics added.)

Family Code section 7822, subdivision (a), states: "A proceeding under this part may be brought if any of the following occur [¶] [¶] . . . (3) *One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child.*" (Fam. Code, § 7822, subd. (a)(3), italics added.)

In defining the purpose of the provisions governing adoption, former Civil Code section 232.6 and Family Code section 7800 use identical language: "to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life." (Compare Family Code, § 7800 to Civ. Code, former § 232.6, Deering's (1987) at p. 87.)

Similarly, both Civil Code former section 232.5 and Family Code section 7801 direct that the adoption statutes be "liberally construed to serve and protect the interests and welfare of the child." (Compare Family Code, § 7801 to Civ. Code, former § 232.5, Deering's (1987) at p. 87.)

The *Kelsey S.* court held that the statutory scheme related to termination of the parental rights of an unwed father violates federal constitutional guarantees of equal protection and due process to the extent "the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights *on nothing more than a showing of the child's best interest.*" (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, italics added.) In other words, federal due process "prohibits the termination of [the presumed father's] parental relationship absent a showing of his unfitness as a parent." (*Ibid.*) Here, Joshua and Judith were required to establish parental unfitness (abandonment) by clear and convincing evidence. We cannot devolve the precise statutory framework for terminating a presumed father's parental rights by liberally interpreting those statutes to allow the child's best interest to trump constitutional and legislative requirements.

We also note the cases cited by the minors do not support the proposition the court is required to consider the child's best interests before it determines whether the petitioner has met the burden to establish abandonment. In *Neumann v. Melgar*, *supra*, 121 Cal.App.4th 152, the trial court found the father abandoned his children, and terminated parental rights without reviewing the evaluator's report, interviewing the oldest child or considering whether to appoint independent legal counsel for the children. (*Id.* at p. 156.) The reviewing court upheld the finding of abandonment and vacated the judgment because the trial court had not complied with its statutory obligation to assess the best interests of the children before it terminated parental rights. (*Ibid.*)

Similarly, in *In re Marcel N.* (1991) 235 Cal.App.3d 1007, the reviewing court reversed the judgment terminating parental rights because the record did not contain facts concerning the father's current circumstances sufficient to justify freeing the children from his custody and control, and the record did not contain an explicit finding that termination was in the children's best interests. (*Id.* at pp. 1014-1015.) Thus, the cases minors rely on support the principle the court may not terminate parental rights without considering the child's best interests, and are not applicable here.

We conclude the trial court properly determined that, absent a finding of abandonment, it could not terminate Raymond's parental rights on a "best interests of the child" standard. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849; *Baby Boy S.*, *supra*, 194 Cal.App.3d at p. 933.) In a section 7822 proceeding, the petitioner bears the burden to prove the elements of abandonment by clear and convincing evidence. If the court finds abandonment, then it must consider the child's best interests before deciding whether to terminate parental rights. (*Neumann v. Melgar*, *supra*, 121 Cal.App.4th at p. 156; *In re Marcel N.*, *supra*, 235 Cal.App.3d at pp. 1014-1015.) The court did not err when it denied the petition on the ground that petitioners did not prove abandonment.

DISPOSITION

The judgment is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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MCDONALD, J.

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IRION, J.